Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Appellants,

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR,

Appellees.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

BRIEF OPPOSING MOTION TO DISMISS

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Appellants, pursuant to Supreme Court Rule 16.5, submit this brief in opposition of the Motion to Dismiss submitted by Appellees, dated October 2, 1985.

STATEMENT

Appellants, in their Jurisdictional Statement, presented the following question to this Court:

> "Whether a municipality may regulate the location and operation of First Amendment protected businesses by

> requiring that special use approval be made prior to operation of such a business, and if so whether the standards set forth in the City of Warren's Zoning Ordinance, Sections 14.02, 20.07 and 21.06 sufficiently guide the special use decision making authority under the First and Fourteenth Amendments of the Constitution of the United States in ruling on special use applications by First Amendment protected businesses."

In response to Appellants' Jurisdictional Statement, Appellees submitted a Motion to Dismiss. As argued below, Appellees contentions are without merit.

ARGUMENT

Appellees are barred from raising their first argument—that Appellants' alleged non-compliance with the locational requirements necessary for site plan approval leaves Appellants without standing to challenge the special use law—because Appellees failed to previously raise this alleged defense at both the trial and appellate court levels. In *United States v. Donnelly's Estate*, 397 U.S. 286, 90 S.Ct. 1033 (1970) the Court refused to consider a defense which was not considered by the trial court or the appellate court. The rule that a defense cannot be made for the first time in the appellate court is well-established and indisputable. *See, Canal & C.S.R. Co. v. Hart*, 114 U.S. 654, 5 S.Ct. 1127 (1885); *Morrill v. Jones*, 106 U.S. 466, 1 S.Ct. 423 (1883); *Bates v. Coe*, 98 U.S. 31 (1878); *Bell v. Bruen*, 42 U.S. 169, 1 How. 169 (1843).

That this defense was not previously raised is apparent from examining the trial court and appellate court decisions, found in the appendix to Appellants' Jurisdiction Statement at pp. 27a and 1a, respectively. Since a court will not rule on constitutional grounds if a non-constitutional basis for ruling is present, the trial court and appellate court would be expected to at least discuss a non-constitutional defense raised by one of the parties. However, no such discussion, even in passing, is present in either the trial court or appellate court opinions. In addition, Appellants' brief to the Michigan Supreme Court noted that Appellees had not raised the issue of non-compliance with the site plan provisions. The relevant passage states that:

> "The City of Warren has not argued in this case that the Danish News Company violates these spatial criteria [as found in Section 14.02(c)(2)]—and, in addition, counsel for the City of Warren cannot, with any degree of sincerity, even tell this Court how the measurements are made, with City officials themselves being in sharp disagreement."

Appellants Brief to the Michigan Supreme Court at p. 17, n.9. Yet now, for the first time in this case, Appellees claim (without

the Court having benefit of the record) that (1) Appellants property is located within 100 feet of property zoned residential, and (2) non-compliance with the site plan locational requirements removes Appellants' standing to challenge the special use law. Appellees' Motion to Dismiss at pp. 4-5. Having failed to previously raise these issues, Appellees are barred from herein asserting the defense of lack of standing.

Additionally, Appellees' asserted defense of lack of standing fails as a matter of law. Section 14.02 is a special use ordinance, as contrasted to a pure zoning ordinance. That is, the operative element necessary for the lawful operation of an adult business is the obtaining of special use approval, rather than simply locating in certain designated areas. The site plan provision is merely a subpart of the special use scheme; site plan approval has no independent significance apart from its being a hill which must be climbed before special use approval can be obtained. Thus a finding that Warren's special use law is unconstitutional necessarily renders the site plan provision meaningless. A business cannot be required to obtain site plan approval so as to qualify for consideration as a special use when the special use provision is found unconstitutional (and hence void ab initio). Therefore, compliance with the site plan locational requirements is not a prerequisite for standing to challenge the special use law, since the site plan provision is not an independent law, but rather is merely a part of the special use procedure, which procedure is being attacked as a whole. If Warren's special use procedure is held unconstitutional, Appellants will not be required to obtain site plan approval, since whether such approval is obtained or not has no meaning aside from its place in the special use procedure. Thus whether Appellants currently qualify for site plan approval is irrelevant.

Appellees' second argument in support of their motion to dismiss questions the ripeness of this appeal. However, no authority is cited for their novel position that a second independent action brought by different parties challenging a law previously attacked in another, separate action somehow di-

vests the Supreme Court from considering an appeal in the first action. The present action is clearly ripe for review; it has proceeded through the channels of the legal system to the point where, under 28 U.S.C. § 1257(2) the right of appeal to this Court exists. Surely the Supreme Court need not await the decision of a lower court which by happenstance is considering the same law presented for resolution to the Supreme Court. The only possible effect the lower court's decision may have on this Court is if the district court rules against the constitutionality of the ordinance since then a conflict would result between the state and federal courts which may militate in favor of noting jurisdiction of this appeal. In short this appeal is ripe for review, and the fact that another court may be considering the constitutionality of the same law in issue in this appeal does not unripen this appeal.

CONCLUSION

For these reasons, this Court should deny Appellees' Motion to Dismiss, and instead should note probable jurisdiction of this appeal.

Respectfully submitted,

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October 8, 1985